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No. ____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

WILLIAM AND MARY LOU CASTORR, Petitioners,

v.

JOHN M. BRUNDAGE, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

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July 8, 1982

QUESTIONS PRESENTED

1. Is there federal court habeas corpus jurisdiction for a parent who brings an action pursuant to 28 U.S.C. Section 2241 et seq. after termination of parental rights?

2. Does the res judicata principle bar petitioners' civil rights claims under 42 U.S.C. Section 1983 when those claims could have been brought in state court but were not actually litigated in state court?

3. Is it proper to dismiss all claims against state officials because of judicial and Eleventh Amendment immunity when the complaint seeks injunctive and declaratory relief and names such respondents in their individual and official capacities?

NAMES OF THE PARTIES*

WILLIAM and MARY LOU CASTORR, Petitioners,

v.

JOHN M. BRUNDAGE, judge of Probate of Calhoun County, Michigan; CALHOUN COUNTY PROBATE COURT; MICHIGAN DEPARTMENT OF SOCIAL SERVICES; PATRICK ANDERSEN, individually and as an employee for the Michigan Department of Social Services; LEONARD and GLORIA SHUMATE, individually and as foster parents for the Michigan Department of Social Services, Respondents.

*The only party to these proceedings whose name is not on the caption of the case is Donald Wayne Castorr, who is the child of petitioners William and Mary Lou Castorr.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. _____

WILLIAM and MARY LOU CASTORR, Petitioners,

v.

JOHN M. BRUNDAGE, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners William and Mary Lou Castorr respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 23, 1982.

OPINION BELOW

The opinion of the Court of Appeals is reported at 674 F. 2d 531. The District Court opinion, which was affirmed by the Sixth Circuit, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 23, 1982. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 28:

Section 2254(a).

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judg-

ment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

United States Code, Title 42:

Section 1983. Civil action for deprivation of rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Eleventh Amendment:

The Judicial power of the United

States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Donald Wayne Castorr is the youngest of six natural children of petitioners William and Mary Lou Castorr. In September of 1975, Donald was placed in temporary foster care by the State Probate Court. In February of 1976, Donald was made a temporary ward of the Probate Court. After hearings which took place in February and March of 1977, the parental rights of the petitioners to their son Donald were terminated by the Probate Court on June 22, 1977. Appeals were taken from this ruling to the State Circuit Court and the Michigan Court of Appeals; and both Courts

affirmed the action of the Probate Court in terminating parental rights. The petitioners then applied to the Michigan Supreme Court for leave to appeal, which is discretionary and which was denied on December 21, 1979. As part of that application for leave, the petitioners asserted, for the first time, that the Michigan statute relating to termination of parental rights was unconstitutional.

On March 7, 1980, petitioners, seeking compensatory, declaratory and injunctive relief, filed suit in the District Court for the Western District of Michigan against the Probate Court, the Probate Judge, the foster parents, the state Department of Social Services and an employee of that Department. In that complaint, the petitioners challenged the constitutionality of the statutory scheme under which their parental rights had been

terminated, as well as challenging on due process grounds certain procedures used in the parental termination process. The complaint alleged that the respondents were liable individually and in their official capacities. Petitioners sought habeas corpus relief, pursuant to 28 U.S.C. Section 2241 et seq., and damages and injunctive and declaratory relief, all pursuant to 42 U.S.C. Section 1983.

All respondents filed Motions to Dismiss pursuant to F.R.C.P. 12(b)(6). The September 3, 1981 opinion of the District Court Judge granted the respondents' Motion, thereby dismissing the complaint. An appeal was promptly taken and the Sixth Circuit Court of Appeals, in its opinion of March 23, 1982, affirmed the District Court's dismissal on the following grounds (pages 2 and 3 of slip opinion):

1. Petitioners' claim for habeas

corpus relief is judicially inappropriate;

2. The claims based on civil rights statutes are barred by res judicata;

3. Judicial immunity bars petitioners' claim for damages against the state judge; and

4. Petitioners' claim for damages against the Michigan Department of Social Services is barred by the Eleventh Amendment.

The Sixth Circuit Court of Appeals opinion did not address the questions of whether the dismissal was appropriate when declaratory and injunctive relief was sought against state officials as well as compensatory relief or whether the dismissal was appropriate against the respondents, who were sued in their individual and official capacities, in their individual capacities.

REASONS FOR GRANTING THE WRIT

1. THE INTRIGUING HABEAS CORPUS JURISDICTIONAL FACTUAL BASIS IN THIS CASE APPEARS TO BE MORE APPROPRIATE FOR THE EXERCISE OF JURISDICTION THAN IN THE CASE OF LEHMAN v. LYCOMING COUNTY CHILDREN'S SERVICES AGENCY; AND THIS COURT GRANTED CERTIORARI ON OCTOBER 6, 1981, IN THAT CASE.

In this case, as in Lehman v. Lycoming County Children's Services Agency, 648 F. 2d 135 (3rd Cir. 1981) (en banc), cert. granted, 50 U.S.L.W. 3244 (Oct. 6, 1981) (No. 80-2177), the parents, whose parental rights have been terminated, are attempting to assert, on behalf of themselves and on behalf of the minor child who has been taken from them, a habeas corpus claim pursuant to 28 U.S.C. Section 2241 et seq.

The arguments made in the Lehman

case are equally applicable in the present case. This case should be heard with Lehman. This Court has never opted to rule on the propriety, or lack thereof, of habeas corpus relief in the parental termination context. Petitioners strongly urge that the most rational and persuasive position is for allowing habeas corpus relief in this situation. As pointed out in Jones v. Cunningham, 371 U.S. 236, 238-39 (1963), habeas has seen a considerably expanded usage, and it was noted in that case that under English common law, habeas could be employed in custody disputes between warring parents. See Ronald Sokol, Federal Habeas Corpus, Section 6.1, at 73 (2d Ed. 1969).

The Castorr child certainly appears to fall within the literal language of the habeas statute, in that, in the words of that statute, he is "in custody pursuant to the judgment of a State court...in vio-

lation of the Constitution," and "the applicant has exhausted the remedies available in the courts of the State." 28 U.S.C. Section 2254(a) and (b). And, since it is clear that petitioners have exhausted state remedies by appealing up to the highest court in the state, the only real question is that of custody. Judge Rosenn, in his dissenting opinion in Lehman, supra, noted that, in his mind, the state supervisory control over the children was sufficient to meet the custody requirement in the federal habeas statute. This conclusion seems appropriate in that the child was being held solely at the behest of the state, as is the Castorr child. In support of that conclusion, Judge Rosenn pointed out at page 162:

> ...[h]ow can one plausibly declare that the removal of a child by the State from his natural family and the nonconsensual termination for

> all time of the reciprocal relationship between mother and child impinges less on personal liberty than the call to active duty of an inactive reservist who had not yet reported for service, Hammond v. Lenfest, 398 F 2d 705 (2nd Cir. 1968), or that it constitutes less of an impingement on liberty than experienced by an accused released on his own recognizance, Hensley v. Municipal Court, 411 U.S. 345 (1973).

See also Jones v. Cunningham, supra at 242, where this Court found one on parole to be "in custody" for habeas purposes.

In a parental termination situation, it is the state which is depriving an individual of fundamental personal liberties and in that sense it is not too unlike a criminal prosecution. See Moore v. Sims, 442 U.S. 415, 423 (1979), in which the Court said that the "temporary removal of a child in a child abuse context is...in aid of and closely related to criminal statutes." And, as Judge Rosenn pointed out at page 163 of Lehman:

This is a proceeding in which the State itself has taken temporary custody of the children after utilizing its own judicial machinery to terminate, permanently and in all respects, the legal relationship of the children and their natural mother. Thus, this is not merely a dispute over which of the children's natural parents should raise them but whether the State may constitutionally forever foreclose the children from any relationship whatsoever with their natural parent. The important social and psychological consequences of this distinction cannot be overemphasized. The total extinction of a familial relationship between children and their biological parents is the most drastic measure that a state can impose, short of criminal sanctions, to protect disadvantaged or neglected children. The termination of the mother's rights in her children is, in effect, a declaration to the children that their mother is legally dead. Therefore, any suggestion that the exercise of jurisdiction in this case will lead to the exercise of jurisdiction in ordinary child custody disputes between natural parents is disingenuous and palpably unrealistic.

This case is more appropriate for habeas relief than either Lehman, supra, or Sylvander v. Home for Little Wanderers, 584 F. 2d 1103 (1st Cir. 1978). In both of those cases, the complaining parents had voluntarily relinquished their children to private homes in the first instance. Furthermore, as Judge Rosenn noted at 158 in Lehman, Sylvander should not have been relied on by the four judges responsible for the plurality opinion in Lehman because "Sylvander concerned custody of a private adoption agency and did not involve state action." In the present case, the parents took no voluntary action to facilitate parental termination, and the "state action" is apparent in that the Draconian action of the state was the sole basis for the child's removal from the parents. This case is even more suitable for habeas jurisdictional relief than Leh-

man, the case in which certiorari has been granted.

2. THE RES JUDICATA DECISION BELOW IS ONE MORE EXAMPLE OF THE SERIOUS SPLITS AMONG THE CIRCUITS ON THIS ISSUE; AND THIS COURT DESPERATELY NEEDS TO RESOLVE THE ISSUE OF WHETHER CONSTITUTIONAL CLAIMS NOT ACTUALLY LITIGATED IN EARLIER STATE COURT PROCEEDINGS ARE BARRED IN A SUBSEQUENT FEDERAL SUIT.

In analyzing the res judicata issue, it is first important to determine whether the due process issues and the void for vagueness issues, which are the substance of the Section 1983 claims, were actually raised in the state court system. It is clear that these issues were not raised in the Calhoun County Probate Court, the Calhoun County Circuit Court or in the Michigan Court of Appeals. However, the petitioners did attempt to raise the unconstitutionality of the parental termination statute for the first time when they

sought leave to appeal to the Michigan Supreme Court. But, the Michigan Supreme Court denied that leave to appeal; and consequently, those issues, although petitioners tried to bring them before the state court system at the highest level, were not actually litigated or argued in the state court system.

This case must be considered as one where the constitutional claims were not actually raised and litigated in earlier state court proceedings but could have been raised. The circuits are severely split on the question of whether to apply the res judicata doctrine to Section 1983 federal court claims where the constitutional claims could have been but were not raised in an earlier state court proceeding.

Whereas the First, Ninth and Tenth Circuits appear to support the Sixth Circuit res judicata ruling in this case--

see, e.g., Gallagher v. Frye, 631 F. 2d 127 (9th Cir. 1980); Scoggin v. Schrunk, 522 F. 2d 436 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976); Spence v. Latting, 512 F. 2d 93 (10th Cir.), cert. denied, 423 U.S. 896 (1975); and Lovely v. Laliberte, 498 F. 2d 1961 (1st Cir.), cert. denied, 419 U.S. 1038 (1974)--the Second and Third Circuits clearly hold that a litigant is not precluded from later asserting 1983 claims in federal court when he could have raised them in a prior state court proceeding but did not. See, e.g., New Jersey Educ. Ass'n. v. Burke, 579 F. 2d 764 (3rd Cir.), cert. denied, 439 U.S. 894 (1978); Lombard v. Board of Educ., 562 F. 2d 631 (2d Cir. 1974), cert. denied, 420 U.S. 976 (1975); and Graves v. Olgiati, 550 F. 2d 1327 (2d Cir. 1977).

Four other circuits have mixed and differing feelings. In the Seventh

Circuit, compare Kurek v. Pleasure Driveway & Park Dist., 557 F. 2d 580 (7th Cir. 1977), with Blankner v. City of Chicago, 504 F. 2d 1037 (7th Cir. 1974), cert. denied, 421 U.S. 948 (1975). In the Eighth Circuit, complare Alsager v. District Court, 518 F. 2d 1160 (8th Cir. 1975), and Alsager v. District Court, 545 F. 2d 1137 (8th Cir. 1976), with Robbins v. District Court, 592 F. 2d 1015 (8th Cir. 1979). In the Fifth Circuit, compare Mack v. Florida State Bd. of Dentistry, 430 F. 2d 862 (5th Cir.), cert. denied, 401 U.S. 960 (1971), with Jennings v. Caddo Parish School Bd., 531 F. 2d 1331 (5th Cir. 1976). The Sixth Circuit, despite the decision in this case, is also one of the so-called confused circuits, in that Getty v. Reed, 547 F. 2d 971 (6th Cir. 1977) seems to conflict directly with the opinion in this case and Coogan v. Cin-

cinnati Bar Ass'n, 431 F. 2d 1209 (6th Cir. 1970).

Recently the Court, in Allen v. McCurry, 449 U.S. 90, 97 n. 10 (1980) noted the split in the circuits on this issue and explicitly reserved its opinion as to the resolution of the conflict. There has been no decision on this question, although the Court did recently entertain constitutional challenges to state custody procedures under Section 1983, without any indication that the failure to give the state courts an opportunity to consider the federal constitutional questions was a bar to federal jurisdiction. See Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816 (1977). The time for the resolution of this issue is now. An ostrichlike approach on this critical res judicata question is inappropriate.

3. TO LEAVE THE LOWER COURT OPINIONS STANDING ON THE QUESTION OF ELEVENTH AMENDMENT AND JUDICIAL IMMUNITY AS TO EITHER PERSONS SUED IN THEIR INDIVIDUAL CAPACITIES OR AS TO CLAIMS FOR DECLARATORY AND EQUITABLE RELIEF IS CONTRARY TO NUMEROUS DECISIONS OF THIS COURT.

In this case, petitioners filed suit against the probate court, the state Department of Social Services, the judge of the probate court and an employee of the Department of Social Services and these claims were for injunctive and declaratory relief, as well as for damages. Relief was sought against the individual respondents in their individual and official capacities.

While it is absolutely clear that retrospective compensatory relief is barred by the Court's recent interpretations of the Eleventh Amendment (except,

of course, as to relief sought against the individuals in their individual rather than official capacities), it is clearly erroneous to reach the same conclusions, as did the lower courts, as to declaratory and injunctive relief. This is the teaching of Edelman v. Jordan, 415 U.S. 651 (1974) and Quern v. Jordan, 440 U.S. 332 (1979). While it is axiomatic that those decisions prohibit any claim for retrospective monetary relief against the state and state officials, it is equally clear from those decisions that declaratory and injunctive relief, as well as a prospective monetary award, is clearly not prohibited against the state and state officials by the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908), as well as the interpretations of that decision in Edelman and Quern. Consequently, the lower court opinions

as to Eleventh Amendment immunity are in direct conflict with the latest Eleventh Amendment enunciations of this Court.

The ruling dismissing the claims against the individuals in their individual capacities is also erroneous and not compelled in any way by the Eleventh Amendment or Supreme Court interpretations of that Amendment. The Eleventh Amendment does not bar an action for damages against an official sued in his individual capacity. See Quern, supra, as well as Spicer v. Hilton, 618 F. 2d 232 (3rd Cir. 1980).

In Stump v. Sparkman, 435 U.S. 349 (1978), and Pierson v. Ray, 386 U.S. 547 (1967), the Court made it clear that judges are immune from liability for damages. However, judges are not immune from injunctive relief against them, and the injunctive relief contemplated

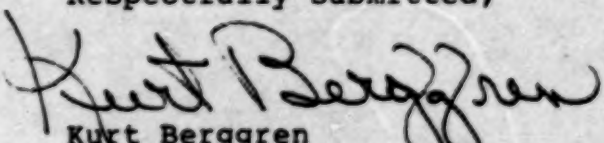
in this case against Judge Brundage is certainly not the type of injunctive relief that from time to time has been held to be improper because it interferes with judicial discretion. The District Court judge erroneously interpreted the injunctive relief sought in this case as being mandatory in the sense of impinging on a state judges's discretionary functions. However, a declaration of unconstitutionality by the federal court would not in any way interfere with the discretionary functions of the state probate court judge. If such a declaration were made as to the constitutional challenges in this case, such declaration and such injunctive relief would merely enjoin the probate judge's powers pursuant to an unconstitutional statute and/or unconstitutional procedure. Discretion would remain untarnished. This is clearly not

the type of case that was contemplated when the judicial immunity doctrine was tentatively and carefully extended to the injunctive relief area by case law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,



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APPENDIX

No. 81-1638

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

William and Mary Lou Castorr,

Plaintiffs-Appellants,

v.

John M. Brundage, et al.,

Defendants-Appellees.

Appeal from the

United States District Court

for the Western District of Michigan.

Decided and Filed March 23, 1982.

Before Keith and Merritt, Circuit Judges, and Phillips, Senior Circuit Judge.

Phillips, Senior Circuit Judge. This appeal involves yet another effort to confer domestic relations and child custody jurisdiction upon a federal court.

The complaint is a collateral attack upon the decision of appellee John M. Brundage, Judge of the Juvenile Division of the Probate Court of Calhoun County, Michigan, awarding custody of Donald Wayne Castorr, who was seven years old at the time of the decision of the Juvenile Judge. Custody was awarded to foster parents over the objection of appellants, the natural parents. The decision of Judge Brundage, dated June 22, 1977, is made an appendix to this opinion.

I.

Judge Brundage was affirmed April 10, 1978, in a well reasoned seventeen page opinion rendered by Judge Stanley Everett of the Circuit Court of Calhoun County, Michigan, holding that the decision of Juvenile Judge was supported by clear and convincing evidence.

The Court of Appeals of Michigan

affirmed the Circuit Court on June 28, 1979. The Supreme Court of Michigan denied leave to appeal on December 21, 1979.

As described by District Judge Benjamin F. Gibson, the complaint in the present case relies upon a "panoply of statutory, constitutional and common law doctrines." Jurisdiction was asserted in the following language:

> This is an action for a Writ of Habeas Corpus, Preliminary and Permanent Injunction, Declaratory Judgment, and Damages, arising under Section 1 of the Civil Rights Act of 1971 [sic], 42 U.S.C. Section 1983, 1988; the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution, and common law habeas corpus to Article I, Section 6 of the United States Constitution....

Plaintiffs sued for $500,000 in damages against all defendants and punitive damages of $10,000 against the foster parents and Patrick Anderson, a social

worker of the Michigan Department of Social Services. Plaintiffs asked the district court to hold unconstitutional the Michigan statutes dealing with termination of parental rights and to order that the child, Donald, be returned to the custody and control of his natural parents. District Judge Gibson dismissed the complaint.

We affirm the decision of the district court on the following grounds:

(1) Plaintiffs' claim for habeas corpus relief is judicially inappropriate;

(2) The claims based on civil rights statutes are barred by res judicata;

(3) Judicial immunity bars plaintiffs' claim for damages against State Judge John M. Brundage;

(4) Plaintiffs' claim for damages against the Michigan Department of Social Services is barred by the Eleventh Amendment.

II.

Donald Wayne Castorr, the youngest of the appellants' six children, was born on August 7, 1970. He weighed four pounds, 13 ounces at birth. Mrs. Castorr testified that she believed he weighed 17 or 18 pounds at one year of age. At the beginning of the school year in 1975, when Donald was five years old, the school authorities suggested that the Castorrs' family physician examine Donald, because he did not seem physically and psychologically prepared to attend school. The family physician referred Donald to Dr. Alfred Hamady, a pediatrician. Dr. Hamady examined Donald and decided to place him in the Leila Hospital in Battle Creek, Michigan, for more thorough examination.

At the time Donald was admitted to the hospital, he weighed 20 pounds and was 34 3/4" in height. An average five

year old boy weighs 40 pounds and is 40" in height. If Mrs. Castorr's estimation of Donald's weight at age one is correct, Donald had gained only two or three pounds in four years. Further, his bone development was that of a two to two and one-half year old, and he walked like a two year old. Donald was not yet toilet trained and still wore diapers at age five. In short, he was grossly underdeveloped mentally, physically and emotionally as compared to normal children of his age.

Donald's condition was diagnosed as "psychosocial dwarfism," or "deprivational dwarfism." This condition, according to Dr. Hamady, is caused by parental neglect, especially neglect by the mother. The lack of emotional interaction and maternal bonding between mother and child evidenced by absence of physical contact such as kissing, holding and hugging, can

result in subnormal development in several respects, including height and weight.

A report on Donald's condition was given to the Michigan Department of Social Services (MDSS). The Department sought a temporary care order so that Donald's hospitalization could continue. Judge Brundage issued the temporary care order pending a preliminary hearing on September 19, 1975. At the preliminary hearing, Judge Brundage authorized the MDSS to file a petition against the Castorrs and placed the child in foster care following his discharge from hospitalization.

The petition was amended on February 17, 1976. On that same day, Judge Brundage held a jurisdictional hearing. The Probate Court took jurisdiction over Donald and made him a temporary ward of the court. The parents stipulated to several medical, sociological and psy-

chological reports and consented to Donald's continued placement in foster care. Donald's parents were ordered to participate in counseling. The final decision as to whether Donald would return to his natural parents was deferred until a dispositional hearing.

Pending the dispositional hearing, Judge Brundage allowed limited visitations between Donald and his parents and ordered further medical and social evaluations of Donald's condition. At the dispositional hearing, Judge Brundage heard extensive testimony, including a considerable amount of expert evidence. The opinions of the expert witnesses conflicted on the question of whether the Castorrs' parental rights should be terminated. One fact, however, was clearly established. Donald's overall condition had improved dramatically since he had been removed

from the Castorr home.

Donald was placed in the hospital on September 15, 1975. In less than a month he had gained five pounds in weight, probably more than he had gained in the preceding four years, and was one-half inch taller. On October 3, 1976, Donald was placed in the home of Mr. and Mrs. Leonard Shumate as foster parents. He was their first foster child. They had two other living children, a son age 12 and a daughter age five. They had lost a daughter at the age of two. Donald's remarkable "catch-up growth" has continued while he has been in the care of his foster parents. By August 23, 1976, Donald had gained 12 pounds and had grown five inches in height. An average child of his age would have gained four to five pounds and grown two inches in height during a comparable period.

There also were remarkable improvements in Donald's mental, social and psychological conditions. Mrs. Shumate testified that only two days were required to toilet train him. At the time he arrived at the Shumate home, Donald was afraid of the grass and the sun. He would eat only milk and dry cereal. Within a few weeks, he began sampling and eating other foods. He began to play with other children. He learned to dress himself and brush his teeth. He no longer feared taking a bath. His abusive and sometimes violent behavior had ceased. All the experts agreed that this was a textbook case of "psychosocial dwarfism" or "deprivational dwarfism," and that there was no doubt that Donald was a happier, healthier and better adjusted child after his placement in foster care.

Further testimony at the dispositional hearing indicated that Donald's

natural parents, the appellants, had not realized the nature and cause of their son's condition. The experts who testified on behalf of the Castorrs proposed a program in which Donald would return to the Castorr home, but the terms of the proposed program were vague and prospective and the chances for the program's success were not found to be convincing. Mr. and Mrs. Castorr did not testify. Judge Brundage concluded that "the child has suffered enough damage from underdevelopment that the court can not take the risk of further damage by returning the child to the custody of the persons in whose care the original damage occurred."

All four of the expert witnesses for the MDSS recommended termination of parental rights. The experts for both parties were in general agreement that a disposition should be made quickly.

After taking the case under advisement, Judge Brundage terminated the parental rights of the Castorrs. His rationale is set forth in his opinion, appendix hereto.

III.

District Judge Gibson appointed Thomas D. Geil, an attorney of Battle Creek, Michigan, as guardian ad litem and next friend for Donald Castorr, removing William Castorr as next friend to his son, because of the father's potential conflict of interest in challenging the validity of the order of the Juvenile Judge. Mr. Geil also had been appointed guardian ad litem by Judge Brundage in the State court proceedings. The guardian ad litem has filed an able and convincing 27 page brief in this court urging affirmance of the decision

of the district judge. Since Mr. Geil was serving as guardian ad litem and next friend for Donald, the district court held that only he would have standing to seek a writ of habeas corpus, and that Mr. and Mrs. Castorr did not have standing to seek habeas corpus relief.

We agree there are strong arguments in favor of denying standing for parents who bring a habeas petition on behalf of a child after termination of parental rights. See Lehman v. Lycoming County Children's Services, 648 F. 2d 135, 151-55 (3rd Cir. 1981) (en banc) (Adams, J., concurring), cert. granted, 50 U.S.L.W. 3244 (Oct. 6, 1981) (No. 80-2177). We note, however, that early English common law cases held that habeas corpus was a proper procedure for parents to regain the custody of their children. See, e.g., Lyons v. Blenkin, 1 Jac. 245,

37 Eng. Rep. 842 (Ch. 1821). We also note that several states, including Michigan, allow parents to bring habeas corpus actions to obtain custody of minor children. See, e.g., M.C.L. § 600.4319.

The Castorrs failed to avail themselves of this alternative State procedure. They did not attack the constitutionality of the Michigan parental rights termination statutes until their application for leave to appeal to the Supreme Court of Michigan. A federal court is not the proper forum for child custody proceedings, especially where State remedies are available. Since the writ of habeas corpus involves principles of comity, it should be used only in cases involving severe restraints upon individual liberty. Hensley v. Municipal Court, 411 U.S. 345, 351 (1973).

These principles of comity and the

availability of adequate State remedies lead this court to conclude, as we did in Anh v. Levi, 586 F. 2d 625, 632 (6th Cir. 1978), that federal courts should not assert jurisdiction over the appellants' habeas corpus claim under the facts in this case. The majority of the United States Courts of Appeals which have considered the question of whether habeas corpus is available to parents who contest child custody disputes have found the extraordinary writ to be inappropriate. See Doe v. Doe, 660 F. 2d 101, 103-05 (4th Cir. 1981), referring to decisions of six other circuits.

Finally, it is not clear that the appellants have exhausted their State remedies, as required by 28 U.S.C. § 2254(b). They did not raise their constitutional contentions until their application for leave to appeal to the

Michigan Supreme Court. Given the reluctance of the federal courts to entertain jurisdiction over the "whole subject of domestic relations of husband and wife, parent and child," Ohio ex rel. Popovici v. Agler, 280 U.S. 379, 383 (1930), we conclude that deference to state expertise in the field of domestic relations requires us to refuse to accept jurisdiction over the habeas corpus claims of appellants.

IV.

The district court held that the appellants' claims under 42 U.S.C. § 1983 and the United States Constitution were barred by principles of res judicata.

In Allen v. McCurry, 449 U.S. 90 (1980), the Supreme Court recognized that there is a split in the circuits on the question of whether "normal

rules of claim preclusion" should apply in § 1983 suits in which the plaintiff "seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state court suit against the same adverse party." Id. at 97, n. 10. The Court declined to express a view on the issue since it was not before it. Id.

The appellants assert the above issue is now squarely before this court. They contend that they did not litigate their constitutional claims in State court; they raised the constitutional questions for the first time in their application for leave to appeal to the Michigan Supreme Court. They argue that the constitutional issues are so important that their claims should not be barred by principles of res judicata especially when appellants "impliedly

reserved their constitutional issues by raising them only at an appellate level where there was no appeal as of right."

Without considering the inconsistency between the above argument and the claim of appellants that they have exhausted their State remedies for the purposes of their habeas corpus petition, we follow Coogan v. Cincinnati Bar Ass'n, 431 F. 2d 1209 (6th Cir. 1970), which places the Sixth Circuit with those circuits holding that a § 1983 claimant "is precluded by the doctrine of res judicata from relitigating not only the issues which were actually involved in the state proceeding, but also the issues which he might have presented." Id. at 1211.

Appellants contend that the statement quoted above in Coogan was only dictum, and that in Getty v. Reed, 547 F. 2d 971 (6th Cir. 1977), this court

held that res judicata is inapplicable when the claims not raised in the state proceedings attack the constitutionality of a state statute. We disagree.

The State court decision which the appellant in Coogan, supra, 431 F. 2d 1209, sought to attack collaterally is reported as Cincinnati Bar Ass'n v. Coogan, 21 Ohio St. 2d 147, 256 N.E. 2d 218, cert. denied, 400 U.S. 866 (1970). In the State opinion, there is no mention of the constitutional claims raised by Coogan. The plain language of this court's opinion in Coogan, supra, 431 F. 2d 1209, is that Coogan not only could not relitigate those issues actually litigated in the State proceedings, but also "the issues which he might have presented." Id. at 1211.

In Getty, supra, 547 F.2d 971, the question was not whether res judicata

was applicable, but whether the district court had jurisdiction over the complaints. In his opinion for the court Judge Edwards specifically stated that the decision was "without reference...to such defenses as res judicata and collateral estoppel." Id. at 974.

We do not hold that the application of the principles of res judicata and collateral estoppel is mandatory in every case. They are an expression of the policy of federal courts preferring finality, i.e., that litigation at some time must become final. In the face of more important federal policies, however, the preference for finality might be outweighed by more compelling considerations. We do not foreclose the possibility that certain § 1983 claims might not be barred by res judicata under proper circumstances. We hold only that

the facts of this case do not present a proper situation in which to find an exception to the principles of res judicata.

Cases involving matters of probate, see Tonti v. Petropoulous, 656 F. 2d 212 (6th Cir. 1981), or domestic relations, as in the present proceeding, present situations in which the importance of finality is compelling. Further, in these types of cases, federal courts historically have deferred to the expertise of State courts, and have avoided accepting jurisdiction under the principles of comity. Thus, substantive federal policy supports the application of res judicata to the § 1983 constitutional claims of appellants.

V.

We hold that Judge John M. Brun-

dage is absolutely immune from liability for money damages. Stump v. Sparkman, 435 U.S. 349, 359-60 (1978).

We further hold the claim of appellant for money damages against the Michigan Department of Social Services is barred by the Eleventh Amendment. Edelman v. Jordan, 415 U.S. 651 (1974).

The judgment of the district court is affirmed. No costs are taxed. Each party will bear his or its own costs on this appeal.

APPENDIX

STATE OF MICHIGAN

JUVENILE DIVISION OF THE PROBATE COURT

COUNTY OF CALHOUN

IN THE MATTER OF:

Donald Wayne CASTORR,

Minor Child.

FINDING

This matter first came before the Court on September 19, 1975, on a complaint filed by the Protective Services Unit of the Michigan Department of Social Services alleging that the minor child was underdeveloped and malnourished and that the parents had failed to obtain necessary medical attention for the minor child.

At a preliminary hearing on September 19, 1975, a Referree of this Court

authorized the filing of a petition and placed the child in foster care after the child was discharged from then present hospitalization. The authorized petition was filed September 24, 1975, and it was later permitted by the Court to be amended on February 17, 1976. The petition as amended alleged under the Michigan Juvenile Code that the parents of Donald Wayne Castorr failed to provide necessary medical attention for the minor child, that the child was deprived of emotional well being and that the home of the parents was an unfit place for the child to live because of such neglect of the parents.

The petition came on for a jurisdictional hearing on February 17, 1976, at which time the Court took jurisdiction over the minor child and made the child a temporary ward of the Court pursuant

to the consent and stipulation of the parties, who also at that time stipulated several medical, psychological and social reports into evidence. The child was continued in foster care pursuant to the Court order entered on that date, and the parents of the minor child were ordered to participate in counselling as directed by the Court.

During the time pending the dispositional hearing in this case, the Court ordered certain limited visitations between the parents and minor child, and the Court ordered further medical and social evaluations of the minor child. After hearing certain motions and ordering further limited visitation, the matter came on for the dispositional hearing at which extensive testimony was heard on February 9 and 10 and March 14, 1977.

At the dispositional hearing this

matter was the subject of considerable expert testimony, which the Court heard on two occasions into the late evening hours in order to accommodate the schedules of the witnesses and counsel. In addition, six depositions and twelve exhibits were admitted into evidence with the exhibits involving extensive medical records as well as a book and articles on the medical and psychological aspects of psychosocial dwarfism also referred to as deprivational dwarfism.

The Court took extensive notes during the testimony, and the Court has expended exhaustive hours reviewing the testimony, depositions and exhibits in preparation for making this finding.

The medical testimony in this case from Dr. Alfred Hamady, a Battle Creek, Michigan, pediatrician, and Dr. Nancy Hopwood, a pediatric endoctrinologist

from the University of Michigan Medical Center, clearly showed, and the Court so finds, that the child was suffering from deprivational dwarfism. When the child was admitted to Leila Y. Post Montgomery hospital in Battle Creek on September 15, 1975, the child weighed 20 pounds and was 30 3/4 inches in height. The testimony disclosed that both measurements placed the child far below normal growth for a five year old child. The testimony further indicated that the child was at approximately the two year level developmentally, far below his chronological age. Further testimony showed that this child had all the classic symptoms supporting a diagnosis of deprivational dwarfism, and that such condition is caused by the emotional environment in the child's home.

The principal issue in the disposi-

tional hearing focused on the medical, psychological and social management of the case. Testimony disclosed that the child had gained eight pounds in the first two months of foster care, and weighed 35 1/2 pounds and was 40 1/4 inches tall after a year in foster care. Dr. Hopwood testified that such rapid catch-up growth was typical of deprivational dwarfism cases when the child was taken out of the parental home and placed in foster care. Dr. Hopwood and Marjorie Bowden, chief social worker at the University of Michigan Medical Center for the departments of obstetrics, pediatrics and gynecology, both testified that the only appropriate remedy for a deprivational dwarfism case of this age and type would be termination of parental rights and subsequent placement of the child for adoption.

Dr. Donald Rossi of Hillsdale, Michigan, and Dr. Ruth Rice of Plano, Texas, both child psychologists, and Vicki Ann Leonard, a pediatric social worker from Ann Arbor, Michigan, testified that the case could be treated by returning the child to the care and custody of his parents together with intensive and continuing psychotherapy and social service support. This treatment approach is founded on the premise that such intervention will change the parents to the degree that the emotional environment will be modified so that the minor child will continue his catch-up growth.

A considerable amount of testimony at the hearing and in the depositions centered on whether the parents of the minor child could make sufficient changes through psychotherapy to produce an environment where the child could safely

grow. Ethel Dudde, a psychiatric social worker at the Battle Creek Child and Adult Guidance Clinic; Dr. Weicher R. VanHouten, a University of Michigan Medical Center psychiatrist and a consulting psychiatrist at the same clinic; Dr. Rossi and Dr. Rice all testified on this point. The Court finds that the testimony in summary indicated that the parents of the minor child refused to have any significant insight into the causal relationship regarding the condition of their minor child and had not profited from counselling during the year prior to the dispositional hearing. Further, the testimony showed Mr. Castorr to have a rigid, hostile personality, and Mrs. Castorr to be suffering from depressive problems. The testimony indicated that both parents need psychotherapy for themselves, and the Court finds that their prognosis for change as

parents in relation to the problems existing with Donald Wayne Castorr is very poor. The Court is convinced and finds that the parents do not have the necessary motivation and understanding to change the emotional environment significantly enough to insure the minor child's continued growth in their care. Even Dr. Rice, called on behalf of the parents, testified that if the parents are not receptive to change the only proper remedy in this case would be the termination of parental rights.

Testimony from two other witnesses support the Court's findings in this case. Gloria Shumate, the foster mother, testified that she regularly had substantial behavioral problems with the minor child when he returned from parental visits. The visits occurred during the time the parents were participating in regular

counselling with Ms. Dudde, and the Court concludes and finds that the emotional problems that caused the diagnosis of deprivational dwarfism were recurring during the parental visitations.

The diagnosis of the child's deprivation is further supported by the testimony of Harold Oliver, a witness called by the parents, who indicated he had been a neighbor of the Castorrs for eight years. He described how he had seen the Castorrs involved in their yard in family activities with their children on many occasions over the years, and yet on cross examination he had never seen the minor child Donald Wayne Castorr in the Castorr yard on any of these family activity occasions.

From a thorough evaluation of all the testimony and exhibits in this case, the Court is compelled to the conclusion

by clear and convincing evidence that this case requires the termination of parental rights in the best interests of the minor child. The Court realizes that the parents desire to have the child returned home, but the Court is convinced that the emotional conditions are such that the parents can not provide a fit home in which the minor child can grow. It is the opinion of the Court that to return the child to the care of the parents, even with supporting services, would be to experiment with the well being of the child. It is the further opinion of the Court that the child has suffered enough damage from underdevelopment that the Court can not take the risk of further damage by returning the child to the custody of the persons in whose care the original damage occurred.

Consequently, an Order terminating

parental rights and making the child a permanent ward of the Court consistent with this finding will enter.

The Court wishes to commend all counsel for their diligence in preparing and presenting this very difficult case. The Court recognizes that all counsel thoroughly researched material and otherwise ably prepared for this case, and the Court appreciates such effort which permitted the issues to be sharply defined and fully explored.

/s/ JOHN M. BRUNDAGE,
Judge of Probate

June 22, 1977

QUESTIONS PRESENTED

1. Whether the recent decision of this Court in Lehman v Lycoming County Children's Services Agency determined that habeas corpus is not proper relief when a state has terminated involuntarily parental rights, thereby making the grant of a writ of certiorari inappropriate on the instant case?

2. Whether the res judicata principle bars Petitioners' civil rights claims under USC §1983 when those claims were not litigated in state court?

3. Whether the Eleventh Amendment bars Petitioners' damage claims against the Respondents?

4. Whether the petition for certiorari should be denied in recognition of the principle of finality which is of paramount importance when parental rights have been terminated?

NAMES OF PARTIES

The only party to these proceedings whose name is not included in the caption of the case is Donald Wayne Castorr, subject of these proceedings.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-48

WILLIAM and MARY LOU CASTORR, Petitioners,

vs.

JOHN M. BRUNDAGE, et al., Respondents.

PETITION IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondents, John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate, respectfully pray that Petitioners' Petition for Certiorari be denied and that the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 23, 1982 be allowed to stand.

OPINION BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 531. The District Court opinion, which was affirmed by the Sixth Circuit, is unreported.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 23, 1982. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

STATUTES INVOLVED

United States Code, Title 28:

Section 2241(c)(3).

The writ of habeas corpus shall not extend to a prisoner unless--

(3) he is in custody in violation of the constitution or laws or treaties of the United States; . . .

Section 2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

United States Code, Title 42:

Section 1983. Civil action for deprivation rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress.

Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

STATEMENT OF THE CASE

Respondents accept the Statement of the Case as set forth in Petitioner's Petition.

REASONS FOR NOT GRANTING THE WRIT

1. THE DECISION OF THIS COURT IN LEHMAN v LYCOMING COUNTY CHILDREN'S SERVICES AGENCY DETERMINED THAT HABEAS CORPUS IS NOT PROPER RELIEF WHEN A STATE HAS TERMINATED INVOLUNTARILY PARENTAL RIGHTS, THEREBY MAKING THE GRANT OF A WRIT OF CERTIORARI INAPPROPRIATE IN THE INSTANT CASE.

Petitioners are attempting to use habeas corpus as a means to skirt the traditional barriers of res judicata, collateral estoppel, and claim/issue preclusion. Habeas corpus is, of course, an exception to those traditional bars to an action. The question which must be raised is whether habeas corpus is appropriate in a termination of parental rights situation. This Court has conclusively answered that question in the negative by stating that:

> . . . extending the federal writ to challenges to state child custody decisions--challenges based on alleged constitutional defects collateral to the actual custody decision--would be an unprecedented expansion of the jurisdiction of the lower federal courts. Lehman v Lycoming County Children's Services Agency, No. 80-2177, slip op. at 9 (U.S. June 30, 1982).

Habeas corpus has never been a generally available remedy, and has never been available to challenge child custody. This case which is like Lehman as it involves custody after parental rights have been terminated, lacks a party in interest who is in custody within the meaning of 28 USC§2254. A child who has been placed in a foster home pursuant to a termination of parental rights is not in custody within the meaning of 28 USC §2254 as determined by this Court in Lehman when it stated:

> They are in the 'custody' of their foster parents in essentially the same way, and in the same extent, other child-

> ren are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. slip op. at 8.

Donald Wayne Castorr is in the custody of his foster parents, but he is far from suffering unusual restraints. On the contrary, Donald has grown physically and emotionally during his years with his foster parents.

To provide a seventh forum for the hearing of this case by granting a writ of certiorari is inappropriate and would, in fact, be harmful to the forgotten victim of this case, the child, Donald Wayne Castorr, by frustrating the important judicial principle of finality articulated by this Court in its Lehman decision.

In exploring whether Petitioners are the proper parties to ask for habeas corpus,

it must first be noted that the interests of Donald Castorr, the minor child, and his biological parents are not necessarily the same. This conflict was recognized at the outset of the District Court's opinion and was the reason why the District Court appointed Mr. Thomas D. Geil as next friend of Donald Wayne Castorr. While the biological parents have an interest in maintaining the integrity of the family unit, a child has the right to physical and mental growth which may be impeded or destroyed by that very family unit, as was the situation in the instant case. Judge Adams, in Lehman v Lycoming County Children's Services Agency, 648 F.2d 135 (3d Cir. 1981), cert. granted 50 USLW 3244 (Oct. 6, 1981) (No. 80-2177), points out how the interests of the biological parents and the children diverge, especially in a stiuation where the parents' rights are terminated. Judge

Adams states:

> While the intervention of the state via parental termination proceedings signals a potential nonalignment of the parent and child's interests, another element - the interest in finality - is likely to be valued quite differently by parent and child. The parent's prime interest is theoretically in restoring family unity; the redundancy of habeas corpus and the prolongation of litigation is a burden which the parent may consider worth enduring for the sake of reestablishing parental rights. For the child, however, a prompt end to litigation and the clear establishment of a permanent association with a parent figure would seem to be the important goal. From this perspective, it would not appear that the writ of habeas is being exercised here on behalf of the children. This is especially so in a termination situation, where the unqualified ending of the original relationship offers the child an opportunity for an uninterrupted association following adoption by a new parent figure. Moreover, the prospect of a parent bringing a habeas petition on a child's behalf years after the termination of parental rights, and years after the child has attained an established relationship with another parent figure, presents an even greater potential conflict between the parent and child's interests. 648 F.2d at 154.

Judge Campbell, in Sylvander v New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978), addresses the problem and suggests the solution fashioned by the District Court in this case when he said:

> Indeed, several years of state court litigation resulted in the determination that the Home, a charitable institution established to promote the welfare of children, is correct in arguing that Michael's best interests lie in his being adopted. Thus, if this court were to recognize the availability of federal habeas in child custody cases, the proper party to seek the Great Writ on Michael's behalf in this case might as well be the Home as Ms. Sylvander. 584 F.2d at 1111.

If this Court should allow a writ of certiorari to issue, Donald Wayne Castorr's best interests will not be served. He is entitled to stability so that he can continue to grow, physically and mentally. The granting of certiorari would only prolong the uncertainty Donald Castorr has been living with for almost seven years.

2. THE RES JUDICATA DECISION BELOW WAS CORRECTLY DECIDED AND THERE IS NO COMPELLING REASON WHY THIS COURT NEED EXAMINE THAT DECISION BY ISSUING A WRIT OF CERTIORARI.

Petitioners had the opportunity to raise the constitutional questions in this case in the Michigan Juvenile Court, Circuit Court and Court of Appeals. They did, in fact, raise the issue for the first time on appeal to the Michigan Supreme Court. Therefore, Petitioners had the opportunity to raise the issue, but purposely chose not to do so until the case was being reviewed by the highest Michigan Court.

If this case is considered, as Petitioners conclude it should be, as one where the constitutional claims were not actually raised and litigated in earlier state court proceedings but could have been raised, the precedent of this Court would be followed. However, this

Court has not decided this issue, and in the case of Allen v Curry, 449 U.S. 90 (1980), this Court, in a footnote, specifically declined to decide the issue. In Allen, at page 97 n. 10, the Court asserts that the Petitioners' position is definitely in the minority when it states:

> A very few courts have suggested that the normal rules of claim preclusion should not apply in §1983 suits in one peculiar circumstance: Where a §1983 plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state court suit against the same adverse party. These cases present a narrow question not now before us and we intimate no view as to whether they were correctly decided.

Respondents would agree with Petitioners that the circuits are split on the question of whether to apply the res judicata doctrine to 42 USC§1983 federal court claims where the constitutional claim could have been, but were not, raised in an earlier state court proceeding. That

split of opinion is amply demonstrated in their petition. In the case presently before this Court, Petitioners had every opportunity to raise the issues presented to the District Court at the state level, but chose not to do so until they reached the Michigan Supreme Court. It was Petitioners' apparent strategy to appeal the factual determination at the state level and the §1983 constitutional questions at the federal level. This strategy is wasteful of our judicial system and denies the need for finality which is of overriding importance in a case of termination of parental rights. The need to avoid this prolongation of litigation is critical when parental rights have been terminated, because it is the child involved who suffers. The present case took three years to pass through the Michigan Appellate system alone. The rule which Petitioners would commend to this Court

would allow and encourage the parties to save their constitutional issues until after the state appellate remedies have been exhausted, thereby extending the litigation even further.

The Sixth Circuit, in deciding this issue, recognized the importance of finality in these types of cases and the importance of using the state forum to resolve such issues when they stated:

> Cases involving matters of probate, see Tonti v. Petropoulous, 656 F. 2d 212 (6th Cir. 1981), or domestic relations, as in the present proceeding, present situations in which the importance of finality is compelling. Further, in these types of cases, federal courts historically have deferred to the expertise of State courts, and have avoided accepting jurisdiction under the principles of comity. Thus, substantive federal policy supports the application of res judicata to the §1983 constitutional claims of appellants. Castorr, 674 F.2d at 536, 537.

In the instant case, the litigation has already been protracted, creating a devastating limbo for the minor child who

is the crux of the litigation. State courts are adequately able to decide the issues which have been presented to the Federal District Court in this case. Those issues should have been presented at the state level for decision and Petitioners should be precluded from bringing forth those issues at this late date. There is no good reason why this Court should provide yet another forum in the present case. The policy reasons expressed by the Sixth Circuit are sound and to extend litigation in the present case only will victimize further the subject of this case, Donald Wayne Castorr.

3. THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE SIXTH CIRCUIT'S OPINION ON THE QUESTION OF ELEVENTH AMENDMENT JUDICIAL IMMUNITY WAS CORRECT AND CONSISTENT WITH THE OPINIONS OF THIS COURT.

Petitioners, in their District Court

Complaint, ask for preliminary and permanent injunctions against the Calhoun County Probate Court. The Calhoun County Probate Court is a subdivision of the State of Michigan. The Eleventh Amendment, by its terms, bars any action in law or in equity against one of the states by citizens of another state, or citizens of another country. Missouri v Fiske, 290 U.S. 18 (1933). The amendment has been extended, by interpretation, to confer immunity in actions by the defendant state's own citizens as well. Hans v Louisiana, 134 U.S. 1 (1890). Therefore, the Eleventh Amendment would be a bar to the equitable injunctive relief sought by Petitioners in their District Court complaint and a suit against the Calhoun County Probate Court was correctly dismissed. Missouri v Fiske.

The Michigan Department of Social Services is also a division of the State

of Michigan. Once again, the Eleventh Amendment and the cases interpreting it are clear that, absent a waiver by the state, a federal court is powerless to entertain any claim for retrospective monetary relief against the state. Petitioners' District Court complaint asks for such relief against the Michigan Department of Social Services, and is therefore properly dismissed.

Individual state officials are also sued in Petitioners' District Court complaint. The Eleventh Amendment extends protection to such individuals acting within their official capacities. Edelman v Jordan, 415 U.S. 651 (1974). While a plaintiff can clearly sue a state official in his or her individual capacity, the complaint must state some action taken outside of the scope of that individual's capacity. As the District Judge found in the present case, no such matters were

alleged, and the dismissal of the suit against the state officials was improper.

Judicial immunity as to the injunctive and declaratory relief was granted to Judge Brundage by the District Court. The Sixth Circuit Court of Appeals affirmed, saying: "We hold that Judge John M. Brundage is absolutely immune from liability for money damages. Stump v Sparkman, 435 U.S. 651 (1974)." This issue could very well have been decided on res judicata. Cheramie v Tucker, 493 F.2d 586 (5th Cir.) cert. denied, 419 U.S. 868 (1974). This issue simply proposes a new challenge to the constitutionality of a law after the proper channels of appeal have been closed by the Petitioners' own actions.

4. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN RECOGNITION OF THE PRINCIPLE OF FINALITY WHICH IS OF PARAMOUNT IMPORTANCE WHEN PARENTAL RIGHTS

HAVE BEEN TERMINATED.

This is the seventh court to review and consider the matter of Donald Wayne Castorr. At the initial hearing of this case, the Court concluded that Donald's physical condition was brought about by emotional deprivation and could only be reversed by placing Donald in a stable and permanent setting. The findings of the Juvenile Court were made a part of the Sixth Circuit opinion. Donald has been in that stable environment he so desparately needs, but that could be changed if the decisions of the lower courts should be overturned. Having cases decided quickly and in a final manner is thus not only important as a judicial principle, but is especially important to the children involved when parental rights are terminated. As this Court stated in Lehman v Lycoming County Children's Services Agency:

> The state's interest in finality is unusually strong in child custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home', under the care of his parents or foster parents, especially when such certainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions. slip op. at 11.

Unfortunately, the harm to Donald Wayne Castorr continues as long as this case remains open. He is a forgotten victim who stands a good chance of being lost through an overuse of the judicial process. The public interest can only be served by allowing the Juvenile Court to attempt to fulfill the needs of this child, thereby creating a healthy child, and sub-

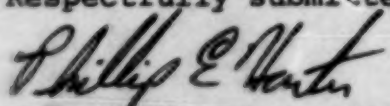
sequently, a healthy adult. That court diagnosed the problem of the child's relationship to his natural parents and terminated their parental rights. Termination of parental rights was the only means available to establish the ultimate objective of permanency and stability for the child. Only by establishing a stable and permanent home could the emotional harm suffered by Donald Wayme Castorr in the home of the natural parents be reversed.

These public policy objectives support and reinforce the principle of finality in the termination of parental rights situation. That principle was recognized by the Sixth Circuit in their rapid disposition of the appeal before them. Respondents, therefore, request that this Court again recognize that principle of finality by quickly denying the Petition for Writ of Certiorari.

CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,



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No. 82-48

IN THE
SUPREME COURT FOR THE UNITED STATES

October Term, 1982

WILLIAM AND MARY LOU CASTORR, Petitioners,

vs.

JOHN M. BRUNDAGE, Judge of Probate of Calhoun County, Michigan; CALHOUN COUNTY PROBATE COURT; MICHIGAN DEPARTMENT OF SOCIAL SERVICES; PATRICK ANDERSEN individually and as an employee for the Michigan Department of Social Services; LEONARD and GLODIA SHUMATE, individually and as foster parents for the Michigan Department of Social Services, Respondents.

BRIEF OF GUARDIAN AD LITEM IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Thomas D. Geil
P. O. Box 1714
Battle Creek, MI 49016
Tele: (616) 968-2215
Guardian ad Litem for
Donald Wayne Castorr

August 4, 1982

QUESTIONS PRESENTED

1. The guardian ad litem adopts the questions set forth in the Petition in opposition to a Writ of Certiorari filed in behalf of respondents, John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate.

NAMES OF PARTIES

1. The only party to these proceedings whose name is not included in the caption of the case is Donald Wayne Castorr, subject of these proceedings.

2. Thomas D. Geil is the duly appointed guardian ad litem of Donald Wayne Castorr.

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CITATIONS

None

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 82-48

WILLIAM and MARY LOU CASTORR, Petitioners,

vs.

JOHN M. BRUNDAGE, et al., Respondents.

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Respondent, Thomas D. Geil, guardian ad litem of Donald Wayne Castorr, subject of these proceedings, respectfully prays that Petitioners' Petition for Certiorari be denied and that the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 23, 1982 be allowed to stand.

OPINION BELOW

The Opinion of the Court of Appeals is reported at 674 F.2d 531. The District Court Opinion, which was affirmed by the Sixth Circuit, is unreported.

JURISDICTION

The guardian ad litem adopts the explanation of jurisdiction as set forth in the Petition in opposition to a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit submitted in behalf of respondents John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate.

STATUTES INVOLVED

See Petition in opposition to a Writ of Certiorari to the United States Court of Appeals from the Sixth Circuit submitted in behalf of respondents John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate.

STATEMENT OF THE CASE

Thomas D. Geil, guardian ad litem of Donald Wayne Castorr, subject of these proceedings, accepts the Statement of the Case as set forth in Petitioner's Petition.

REASONS FOR NOT GRANTING THE WRIT

1. PREFACE

Transcript pages of the hearings and depositions are identified as follows: Parenthetical numbers refer to the pages in the transcript of hearings held before the Calhoun County Probate Court; those preceded by the letters "HA" refer to pages in the deposition of Dr. Alfred Hamady, taken on October 26, 1976; those preceded by the letter "H" refer to pages in the deposition of Dr. Nancy J. Hopwood taken on October 28, 1976: those preceded by the letters "D1" refer to pages in the deposition of Ethel Dudde taken on December 7, 1976; those preceded by the letters "D2" refer to pages in the deposition of Ethel Dudde taken on December 23, 1976; those preceded by the letter "V" refer to pages in the deposition of Dr. Wiecher H. VanHouten, taken on January 19, 1977. Transcript quotes are unedited.

This brief is submitted as a supplement to the brief filed by the respondents. Because of the nature of the case, we felt that its essential facts should be summarized. Time is of the essence in this action. Too much time has already elapsed. How much more delay is reasonable? We believe none.

Donald Castorr was five years old when

this action was started. He is now eleven. He has a right to get on with his life. He doesn't really care about the legal issues. He had a miserable life with his natural parents and is now, relatively speaking, thriving. The natural parents were given due process in the Michigan courts. Indeed, they were given every chance to reform. Now they ask for one more chance. Judge Brundage of the Calhoun County Probate Court made a difficult but just decision. Please on behalf of Donald Castorr, let Judge Brundage's decision stand.

2. WHY DID ALL THE PARTIES STIPULATE ON FEBRUARY 17, 1976, THAT THE CALHOUN COUNTY PROBATE COURT COULD ASSUME JURISDICTION OVER DONALD AS AN EMOTIONALLY NEGLECTED CHILD?

A. A Profile of Donald Wayne Castorr in Approximately September and October of 1975.

Donald Wayne Castorr was born on August 7, 1970 and weighed 4 lbs 13 oz. At approximately age one his mother believed he weighed 17 or 18 lbs. (P Ex. 2) When he was seen at

Leila Hospital in Battle Creek on September 15, 1975, the approximate date proceedings were commenced in the Calhoun County Probate Court, he weighed only 20 lbs. and was 34-3/4 inches. (P Ex 2) A normal five year old boy would be approximately 40 lbs. and 40 inches. (HA 10)

Thus, in approximately four years, Donald Castorr had gained only two or three pounds even though during this time his mother said he was not ill. (P Ex 2) Moreover, his x-rays revealed bone development of a two to two and a half year old (HA 8); he walked like a two year old (HA 11); he was abusive in behavior and language ("corn cob up your ass", and "dump shit") (12); he wore diapers and was not toilet trained (14); nor was he able to dress himself or brush his teeth. (73-75)

His foster mother, Gloria Shumate, described his behavior during the month of October as follows:

> "Emotionally, Donald was very abusive, he had glasses and he would rip them off and throw them

on the floor, if you picked them up he would slap you on the face, hit you in the neck, pull your hair. If you had jewelry on he would grab it and rip it off you, his language was very vulgar, also on a physical aspect he had developed a type of walk, it was a shuffle, it wasn't a walk, if you were at the other end of a hall, it was like a train sound. He didn't use muscles of his legs at all, he just shuffled, there was no evidence of his using his muscles at all in his legs." (12)

He also, according to Mrs. Shumate, seemed to be unfamiliar with objects which most of us observe and experience on a daily basis. Mrs. Shumate said:

"Well, we brought Donald home, we took him out in the back and sat him on the ground and he immediately began to scream and he was lifting his feet up, saying 'what is it, what is it?' He was referring to the grass, he didn't understand what the grass was. When we took him inside, the main thing that we had trouble with was doors, he had to open every door, every cupboard, and sometimes not just to look on the other side but repeatedly open and shut and open and shut. The sun not only hurt his eyes but he didn't understand, he called it a light, if the curtains were open and I wouldn't shut them, he would voluntarily climb up on the couch and pull the curtains shut because

the sun hurt his eyes. He was frightened and mad because I wouldn't turn that light off." (13)

Further, when he arrived at his foster parents' home, he could only crawl up and slide down steps, was afraid of grass (the appellants' next door neighbor of eight (8) years, Harold Oliver, testified at 763-64 that he had never seen Donald outside even though Mr. Oliver was an "outdoor nut"), was afraid of cracks in the sidewalk, and would complain of pain in his legs, even if he was on his feet for only a short time. (72-73) Mrs. Shumate indicated that he would have slept continuously if she had allowed him. (14 & 15)

"Donald slept very well, in fact, he would have slept continuously it seems if I wouldn't go in. When I would put Donald down, he would rock, he would wrap his arms around himself and he would rock to the extent that the baby bed would move on the floor and even in his sleep this went on. He would move the bed in his sleep, he would rock himself and he slept flat on his back with his arms wrapped like this. (showing the Court with her arms)

Q Wrapped around the front part of him?

A Yeah, like this, (showing the Court) and he would rock constantly, if Donald woke up, this was one thing that I didn't know, and it took awhile to learn, I would assume that Donald was still sleeping, he wouldn't be, he would be laying in there awake and he would be just waiting apparently for me to come in, he wouldn't say I'm up, I want to get up, he wouldn't get out of bed he would just wait until I would come in and realize that he was awake." (14,15)

Finally, his eating habits were almost, if not, primitive.

"A Donald had no idea how to use silverware. I understand he had started using utensils in the hospital, he did not hold them correctly. His upper lip was formed in a manner and he had a callous here ---

Q When you say here, do you mean the middle part of the lip?

A The middle part of the lip, that I saw in my children from nursing from a bottle, and he couldn't form his mouth around a spoon or a fork, he had to use his teeth to bring anything off the silverware. He ate with his hands when he did have food, he would use -- one time he would use the right hand, then he would use the left hand, he wasn't sure how to use the silver.

Q Was he able to eat regular food?

A No, the only foods that Donald recognized was milk and dry

> cereal. The first food I offered him was scrambled eggs and buttered toast, and my husband for about a week would have to hold him down and force his mouth open and then I would put the food into Donald's mouth and more times than not, he would vomit. But once he would try the food then he did very well, once he got a taste of it." (14)

This was what Dr. Hamady, a Battle Creek pediatrician, faced when he examined Donald at Leila Hospital on September 15, 1975.

B. Psychosocial Dwarfism

When Dr. Hamady examined Donald, it was apparent to him that he needed a work-up. "He looked small and he looked scrawny". (HA 10) Dr. Hamady's subsequent examination and efforts were directed toward trying to find out why Donald was so small, why he had gained only two to three pounds in approximately four years; why, in essence he was so retarded in almost every way.

After all of the relevant lab tests, with the exception of the hand and wrist x-rays, were reported as normal, (HA 8) and after ruling out all other causes (HA 24,25) such as the fact that Donald was premature at birth (4 lbs. 13 oz, HA 10), Dr. Hamady reached a

diagnosis of psychosocial dwarfism (HA 13), a conclusion also concurred in by Dr. Hopwood. (H 22)

Dr. Hamady said that psychosocial dwarfism is caused by neglect of parents, a lack of parental care usually on the part of the mother, involving very little interaction between the mother and child emotionally which leads to lack of physical contact such as caressing, holding and kissing. This lack of emotional interaction between the mother and infant results in an overall lack of development in height and weight. (HA 17,18)

The key to the diagnosis was the fact that:

> "* * * on separation from his home environment in the hospital, in the local hospital, he showed tremendous catchup growth in the subsequent five weeks in the foster care; he again showed an eight pound weight gain which is diagnostic of this condition".
>
> * * *
>
> There is no other condition in which a child may show such a traumatic catchup growth as a child who has been in a stressful

home environment, and removal from that environment shows catchup growth in three to four times the normal growth rate." (H22,23)

See also Dr. Hamady's deposition wherein the following dialogue appears:

"Q Further, Doctor, you have mentioned a number of factors which you took into consideration in arriving at your diagnosis, some of which were clinical findings, some of the tests' results and the fact that he gained weight and height following his removal from the natural home. Which one is most important of all those factors substantiating your diagnosis?

A His progress following removal from his preceding environment." (HA 27,28)

C. Donald's Catchup

On October 13, 1975, Donald had gained six pounds and grown 1/2 inch. (HA 14) Thereafter, he made remarkable strides in height and weight gains:

October 13, 1975	Weight	28 lbs.
	height	35-1/2
Jan. 9, 1976	weight	31 lbs
	height	37-1/4
May 11, 1976	weight	33-1/2
	height	39-1/4
Aug. 23, 1976	weight	34 lbs
	height	40-1/4

(HA 14,15)

The significance of these increases was explained by Dr. Hamady as follows:

"A The fact that he has gained within a year in height and in weight faster than the norm would indicate that prior to his being evaluated that he had not been provided with the equivalent type of care as he has had subsequent to that weight gain and height gain. There has been a drastic change from one period of time in his life to another period of time that we had observation and control over.

Q What would you normally expect a boy like this to gain in height and weight during an equivalent period?

A I would expect four to five pounds a year and two inches in height in this period. He has gained twelve pounds and five inches in height." (HA 17) (emphasis supplied)

Possibly more enlightening than the doctor's testimony about Donald's tremendous catchup were the observations of his foster mother, Gloria Shumate.

At the dispositional hearing held on February 9, 1977, the following dialogue appears and we quote it in total because we think it is extremely important.

"Q In what way has he made progress, please relate to the Court and may-

be make some comparisons to some of the problems you had before?

A Physically, I haven't been able to keep him in clothes. Donald when he came to us was wearing 18 months, that fit him the best. Donald is going into 6's now. He went from an infant size 2 shoe, he's in a 9-1/2 now, Donald's shoe size has been the big thing, every three to five weeks his shoes have had to be replaced. Emotionally, he has turned into a terrific young man, --

MR. SAUER: I'll object to this Your Honor. This is obviously a conclusion, I'll permit the witness to recite facts but not conclusions.

THE COURT: Let me ask this. Are you referring to the need for new shoes because of growth or because of wear?

A Growth.

THE COURT: The objection is sustained.

Q Now going to the question of emotional, will you describe his behavior as it has recently existed as far as an improvement over --

A Alright. Donald enjoys playing outside, this is his favorite activity, he enjoys playing with other children he particularly enjoys constructive games with Tinker Toys, blocks, he plays well with my little girl, he likes to play house, he likes to play these types of games

with her. He is very quick to apologize when he offends, he says 'I'm sorry.' He is excited about going to Sunday School, if I say I'm going shopping, if I say I'm going to get groceries he wants to go too. He does not -- you can hold him on your lap and he's not going to pull your hair or take off your glasses or any of the things he did before.

Q Now, how about his eating habits, how does he eat now?

A Constantly. Very well. Donald enjoys all foods, any food -- when Donald came with us a banana frightened him until one day he started to cry for me to put his coat back on, he didn't understand, now he will eat three or four bananas. He tries new foods, he enjoys them, he loves to go out to eat, he particularly enjoys going out for a hamburger.

Q Have there been any problems now as far as using the bathroom?

A None. There is an area -- sometimes I still do have problems when I have to wash his hair. But this is an exception.

Q Has his sleeping habits improved as far as getting up in the mornings?

A Yeah, he is usually up before the rest of the family, watching Captain Kangaroo that particular day or coming in and telling me he's hungry.

Q What about his language, has that improved?

A Yes." (16-18)

* * *

"Q Did you have occasion during the first couple of months that you had him to take him to a store?

A Yes.

Q What would his reaction be like, did he walk into the store with toys and all sorts of items?

A Yes, I would intentionally take Donald into a store and expose him to things, he would walk up to a little truck and would pick it up and tell me to look at the airplane. He would pick up a little airplane and tell me to look at the little car, he didn't relate, he was excited about what he was seeing.

Q Did he finally get to the point where he could identify what he was picking up?

A Yes.

Q How soon after the first few months did this occur? If you can give us an approximation?

A It was a very short length of time, no more than 2 months.

Q Did you ever take him to a place like McDonald's?

A Yes.

Q How would he react in that kind of an atmosphere?

A The first time we went to McDonald's, Donald hadn't been with us very long and when we went in we were eating a hamburger and french fries and he was scared, he wanted to know where the fork was, I said 'you don't eat a hamburger with a fork,' and I showed him how to pick it up with his hands and he picked it up and looked at it and he was nauseated and he couldn't make himself eat that thing.

Q He doesn't like a Big Mac?

A He does now.

Q Can he eat it all?

A Yes." (71-72)

* * *

"Q How soon after you received him did he begin to develop the kind of motor-skills that allowed him to play with the other children?

A He was out for 4 or 5 hours at a time with the other children within a month he was participating.

Q When he came to your house did he know how to brush his teeth?

A Oh no.

Q How did you show him how to do that?

A The bathroom was our biggest problem, we couldn't get him in the bathroom. We would leave the door open and allow him to observe each one of us and watch us, brushing his teeth was the first thing he ever did and he was very very

frightened. I went and got him a little stool to stand on and he stood up and I was opposite him and we did it together.

Q Okay, what about taking a bath, you told me some things about that when you first got him?

A When Donald first came, when I gave him his bath, he would shake violently and he would turn blue, he would -- like this -- when I put him in the tub he held on the sides of the tub just shaking and crying and I tried playing with him. I cleared the bubbles so he could see his toes and he would not let go the sides of that tub, he was just terrified. I started allowing him to bathe with Laura in the tub together at playtime and he would eventually use one hand and then he would play with her. Laura played an important part, 'if Laura can do it, I can do it too.'

Q Did he eventually learn to relax in the bath tub?

A Yes.

Q Can he take a bath now by himself?

A Yes." (73-74)

* * *

Q Did he ever have any trouble with nail-biting?

A Yes, when Donald came his nails were bitten way back and he had been bleeding, and he would sit and bite on his nails.

Q Does he still do this?

A No.

Q When did he quit doing this?

A Very shortly after he came.

Q Now, he wasn't toilet-trained when you received him but within a short time as I understand it, he was?

A Yes.

Q How many days did it take you to toilet-train him?

A 2 days.

Q 2 days?

A Yes.

Q Could he dress himself when he first arrived at your house?

A No.

Q He could not?

A No.

Q He couldn't put his pants on or shirts?

A No.

Q How long did it take him to learn to dress himself?

A I would say 2 months." (75)

* * *

Q When did he get to the point where he could do flips, or somersaults or climb on monkey-bars and things

like that? He obviously wasn't able to do it in October of 1975.

A I know we were so amazed at the beginning of this spring when my husband would help him up the ladder and slide to go down, and he ran outside the first pretty day and ran up to the slide and went down and we were so amazed because he had grown into coordination in the winter months and he was able to do that.

Q Was that the spring of 1976?

A Yes." (77)

D. Probate Court's Assumption of Jurisdiction and Efforts to Impress Upon Natural Parents The Need for Counseling and Rehabilitation.

Donald's tremendous catchup, both physically and emotionally, can only be explained by the change in his environment. All of the parties recognized this when they stipulated to the Court's assumption of jurisdiction. If Donald's condition was caused by a thyroid deficiency, a heart condition, or cancer, a mere change in his environment would not have cured him. The parties knew the parents would have to change if there was to be any hope of returning Donald safely to them.

When the Probate Court entered its order,

assuming jurisdiction, it stated, among other things:

> "That William A. Castorr and Mary L. Castorr shall participate and cooperate in such counseling as shall be directed by the Court, and that they shall sign releases of any information with such counseling agency or agencies, and that such counseling agency or agencies shall submit a report and evaluation of such counseling to the Court."

The importance of this provision was underscored both by the guardian ad litem and the attorney for the natural parents at the Jurisdictional hearing on February 17, 1976.

The guardian ad litem said:

> "We have entered into this situation with the understanding that they will cooperate and participate in the counseling order by the Court in return for same, I think it is fair to state we have entered into an agreement which you shortly set forth regarding visitation rights." (8)

The attorney for the natural parents said, among other things:

> " MR. SAUER: No, I explained this matter to them fully by the way of conferring with them prior to coming into the Courtroom. I would like to comment for the Record, and to my clients particularly, that

since the crux of this proceeding is to do a proper and adequate job for the subject, Donald, and that involves reintegrating him, who is now in foster care, into this family. I think it necessarily involves an overview, if not intensive counseling with all family members at least contact and an overview of the family unit as an integrated family, both as its' now constituted and as it will be constituted at such time as the Court directs the return of Donald to that home. I would like also the Record to reflect I am urging now and have earlier this morning urged my clients, Mr. and Mrs. Castorr, to participate fully, freely and openly and intensively in such counseling of a psychiatric nature, of sociological nature, of medical nature as may be available through any sources available either within or without the counseling. I think you folks will confirm that I have urged this in the office conference that we have had, I talked with Mr. Castorr privately in my office when his wife was not present and I once again indicate that it is a necessary pursuit that both of you, together and independently, follow in order to reach what you will eventually and ultimately is a satisfactory resolution of this proceeding. Do you both understand?

MR. CASTORR: Is it wise to go to two of the Child Guidance --

MR. SAUER: Mr. Castorr, it is wise to do that which those that know more about it than

any of us here in this room know recommend. Those are bridges that one can only cross when one comes to them and we'll make judgments on those at that time. But the overview of this whole situation is both you folks pursue, actively, openly, eagerly and intensively such counseling of whatever nature is recommended by knowledgable people whenever it may be so recommended. Do you so understand?

MR. CASTORR: I thought maybe we could --

MR. SAUER: Mr. Castorr, do you understand? Mrs. Castorr?

THE CASTORR'S NOD.

THE COURT: The matter of counseling that is in this proposed Order will be left at the direction of the Court. Now, I understand that some appointment has been made with the counseling agency already, is that accurate?

MR. SAUER: The Castorr's have been since sometime in the fall of 1975 been counseling with the Child Guidance and Adult Clinic of this County. We have had some discussion this morning that Family and Children's Services may be involved, I have indicated to the Court that I am investigating the availability of the services of DeLano Clinic in Borgess Hospital in Kalamazoo, I would hope that private psychiatric counseling could be avoided for obvious reasons but if that becomes necessary and other services are not

available to the extent that it's possible, I will urge it." (16,17,18)

Thus, it was eminently clear to all the parties at the Jurisdictional hearing that the Castorrs, Donald's natural parents, would have to engage in intensive counseling if they wanted to have Donald returned to them. While it was not stated on the record, it is also fair to state that everyone hoped that they would engage in the counseling and profit from it so that Donald could be returned to them.

3. A SUMMARY OF EVENTS SUBSEQUENT TO THE JURISDICTIONAL HEARING.

A. Natural Parents' Efforts to Rehabilitate or Change

While Donald was being tested by the doctors and cared for in a foster home, the Calhoun County Probate Court took action to see if the parents could be rehabilitated. As previously stated, the Court made it clear to the natural parents in the Jurisdictional hearing that Donald's returning to them depended in large degree on their response

to counseling. In this regard the testimony of Ethel Dudde and Dr. Wiecher VanHouten was very revealing.

Ethel Dudde, a psychiatric social worker employed by the Battle Creek Child Guidance and Adult Clinic, after counseling with the Castorrs for over a year reported some slight progress at times, but found that their capacity to shift was limited and that they did not recognize the severity of Donald's problem. (D1 10-11) She further testified that the parents' capacity to cope with stressful situations that may bring about regression was limited. (D2 14-15) Mrs. Dudde was able to develop a meaningful relationship with at least Mrs. Castorr over this one year period. Her concern was that they be rewarded when they showed some progress and there was some feeling on her part that the reward should have been visitation. However, this opinion was expressed without the knowledge of the effect that visitation may have had on Donald. (D2 35) The significance

of Mrs. Dudde's counseling experience as far as disposition was concerned was that the Castorrs were quite limited in their ability to change, and still did not recognize that Donald had a problem.

Dr. Wiecher VanHouten, a psychiatrist, who was a consultant to Battle Creek Child Guidance and Adult Clinic, exercised a supervisory function over Mrs. Dudde's counseling of the Castorrs. He testified that the Castorrs had the wrong motivation in seeking counseling. (V 11) They went to the clinic only as a means to get Donald back and never recognized the problem which resulted in Donald's removal. (V 17)

Dr. VanHouten recommended that Donald not be returned to his natural parents based upon the counseling experience (V 14,15) as he believed the Castorrs would revert back to old patterns if Donald was returned. (V 42, 32) Their lack of correct motivation and understandin of the problem, a denial, in effect, that a problem existed, was the basis for his con-

clusion that Donald should not be returned to them. Dr. VanHouten also observed that Mr. Castorr was unable to accept Donald's new behavior pattern. (V 45)

In late November of 1976, Mr. and Mrs. Castorr began to seek treatment on their own. On November 29, 1976, they consulted with Dr. Donald Rossi, an associate Professor of psychology at Hillsdale College, Hillsdale, Michigan. (418) Following this first visit, Dr. Rossi saw Mr. Castorr on December 6, 1976, December 13, 1976 and January 6, 1977. (421, 430, 449 & 450) He then saw Mrs. Castorr at two one-hour sessions on January 25, 1977 and February 2, 1977. At the February 2, 1977 session, he also saw their daughter, Susan and Donald Castorr for one hour. (459,468,95) On two other occasions, January 21, 1977 and February 4, 1977, he saw Donald again. (85)

The other two experts retained by the natural parents were Dr. Rice, a child psy-

chologist from Dallas, Texas (663), and Vickie Leonard, a social worker from Ann Arbor, Michigan, specializing and working with problem children. (226-229) Dr. Rice met with Mr. and Mrs. Castorr for one and one-half hours before she testified on March 14, 1977. (677-78) Mrs. Leonard admitted she had never met with any of the Castorrs before testifying. (273)

The treatment program recommended by the Castorrs' expert witnesses (Drs. Rossi and Rice and Vickie Leonard) was totally prospective in nature, never defined in terms of what is or what was available in Calhoun County and the surrounding area, and uncertain insofar as what its prospects of success were. (200-204, 212-218, 254, 260, 263, 313, 498 and 747)

Moreover, there is a serious question whether the program recommended by petitioners' experts would be of any value to either a family of a child who suffers from psychosocial dwarfism, or to the child. Drs. Rossi

and Rice and Vickie Leonard testified as to their experiences with children who failed to thrive and they based their opinions on those experiences. While it is true that all cases of psychosocial dwarfism could also be labeled failure to thrive, not all failure to thrive cases involve psychosocial dwarfism. Psychosocial dwarfism is a specific medical diagnosis.

In disucssing the distinctions which must be made on the issue of failure to thrive versus psychosocial dwarfism, Dr. Hopwood, Assistant Professor of Pediatrics at the University of Michigan Medical School, said:

> "A This is an area of much controversy as has been described today, and I think that as I looked over the book which was being passed around the room, Pediatric Endocrinology, (inaudible) the chapter in there probably follows my definition very closely. A child to whom I apply the term psychosocial dwarfism is usually over the age of three (3) but not always, it's a child who has a growth failure in addition to usually behaviors abnormalities which have been well described in the past starting in 1968, in a group of children who had hormones, some of whom had

hormone deficiencies and showed dramatic catch-up growth. Most of the children in whom this type of disorder is present was severely dwarfed, severely growth retarded, often if you had been able to document them at certain times during their growth retardation you would have been able to document hormone deficiency. Often at the time we see them this is no longer possible, either because they have grown some or because it is not done. In addition, these children often have many characteristic behavior abnormalities that are not present in the other children, this is usually due to the fact that one: children are mobile, they are able to get around and get into things, have developed a characteristic behavior that is not present in a younger child. Therefore, a child that at one was able to get around and get into doing some of these things might demonstrate some of these behavior abnormalities and indeed might show some of the other abnormalities characteristic of the older children. So, there is an overlap, age wise, most of the children are over the age of three (inaudible) with severe growth retardation and the behavior abnormalities indeed are children who I call psychosocial dwarfs. Some failure to thrive can apply really to all children who do not grow or who do not develop either perhaps, it's just language, perhaps it's some other emotional need, growth is one aspect to failure to thrive. One of the causes of failure to

thrive is maternal depravation on poor bonding.

Q Do you use the term failure to thrive synonymously with the term psychosocial dwarfism?

A No, I don't.

Q Is psychosocial dwarfism a specific medical diagnosis?

A Yes." (625, 626)

See also the testimony of Marjorie Bowden, Chief Social Worker in Pediatrics, O.B. & Gynecology at the University of Michigan Medical Center, at pgs. 538-540 of the trial transcript.

B. The Picture as of March 14, 1977

At the conclusion of the Dispositional hearing on March 14, 1977, certain facts were clearly evident:

1) Donald was an emotionally neglected child who suffered from psychosocial dwarfism.

2) Donald had made tremendous progress during the time he had been removed from his natural parents.

3) Visits with his natural parents caused abnormal and anti-social behavior. (19-26)

4) Donald's natural parents had made little or no progress in achieving any insight into their responsibility for Donald's condition. Indeed, there was evidence that Mr. Castorr had engaged in anti-social behavior directed against Donald's foster parents. (63-70)

5) The petitioners' experts recommended a program which was totally prospective in nature and possibly not even relevant to Donald's condition.

6) Neither of Donald's parents had testified as to their ability or inability to change or to even try to achieve some insight into the nature of the problem. In other words, Mr. & Mrs. Castorr remained silent throughout the entire hearing.

7) As of September 15, 1976, when Dr. Hopwood last saw Donald, he was still significantly growth retarded, at least two to three years below normal. (H 29)

8) Drs. Hamady, Hopwood, VanHouten and Marjorie Bowen, all recommended that parental

rights be terminated. (HA 20; VH 14,15; 556; H 36-41; 615; 643)

9) All of the experts who expressed an opinion on the subject agreed that something should be done immediately. Time was critical. (Leonard, 269; Rossi, 505; Bowden, 557, 558; H 639; and Rice, 732)

In light of these facts, Judge Brundage was faced with three possible alternatives.

First, he could have returned Donald carte blanche with no restrictions to the Castorrs. There was, of course, no support for this possibility.

Secondly, he could have accepted the petitioners' proposal and ordered that Donald be returned to the Castorrs in accordance with the program outlined by their experts. We submit that this would have involved tremendous risk with little likelihood of success.

a) Who would have administered the program? Dr. Rise is from Texas; Vickie Leonard from Ann Arbor; and Dr. Rossi - Hillsdale, Michigan.

b) What was the program? Frankly, we still do not understand precisely what the petitioners are recommending.

c) Would the Castorrs have been responsive to the program? After a year of counseling, neither had shown any progress or movement toward an understanding of the problem. We suspect they are not capable of change. Further, even their experts agree that without their cooperation and desire to change, no program, irrespective of its sophistication, would be of any help. (275,747,750)

d) Would such an experiment have been fair to Donald? Dr. Hopwood and Dr. Hamady testified that Donald could lose much of what he had gained and possibly lose more than he had gained if he were returned to his old environment. (HA 21, H 32,33)

Dr. Hopwood also stated that even a delay of three months in resolving the issue of whether parental rights should be terminated might have been devastating to Donald.

"Q Well, Doctor, just a little over a year has passed since he's been removed from his natural parents and home. What if someone were

to say to you, well, maybe the parents aren't ready now but why not give us another year and see how they do or why not give us another three or four months, what would be your reaction to that?

A Well, I think we are speaking of time here and time in children is very, very different from time in adults. Postponing a Hearing for three months may be an acceptable thing to do for an adult because that's a short period of time. For a child, that's a long period of time. For an infant, that may be half of life. So it's a very different kind of concept and this year for Donald has been a major portion of his life.

He is now a little over six years of age. I looked at his birth date again and I guess he is six years and four months instead of seven months, and this past year he has shown all of his really major gains from an infantile state. So in terms of his developmental progress, this is the major portion of his life, this one year, and to weigh that against the early years of his life, I think in, say, well it's just a small portion is wrong. We have to view it in the child's perspective.

Therefore, to postpone and wait another year with the hopes that possibly he will go back, then we have closer to eighty or ninety percent of his life that we are talking about which has been separate from his natural parents, therefore, during that period of time he's

established relationships with his foster mother and his foster father and has not established relationships with his natural parents because he has in the past established negative relationships with them; not only would he have to go through the process of establishing positive results but he would have to destroy the negative ones and I don't think it's possible for a child at age six to do that." (H37,38)

Judge Brundage's last alternative, an admittedly difficult one, was to terminate parental rights. In choosing this option, we believe he was absolutely correct. While his excellent opinion or finding speaks for itself, possibly the reasons for ordering termination can best be summed up by Dr. Hopwood in the following dialogue:

"Q As of what you know about this situation about Donald, what would you recommend as a medical expert with respect to termination and parental rights now?

A I would recommend that there be termination of parental right and the child be placed for adoption.

Q I'm sure you have covered it but why briefly?

A Why I believe that? Donald is an extremely vulnerable child who has been for the past year tossed around

in spite of the fact that he has shown catchup growth. This may not be his full potential. In addition, I think prolongation of this limbo state cannot be to his best interest." (38-39)

4. THE APPEAL

A. Calhoun County Circuit Court

Petitioners argued before the Calhoun County Circuit Court that we failed to prove by clear and convincing evidence that the petitioners would not be able to reestablish a home for Donald or improve their environment so that Donald could be safely returned to them. In a detailed and thorough opinion, Judge Stanley Everett reviewed all of the evidence and found that Judge Brundage's Order of termination was supported by an abundance of clear and convincing evidence.

He said:

" To summarize then, the proofs clearly indicate that Donald Castorr is the victim of parental neglect, although not of a deliberate nature. While the experts applied different terminology to the condition and differ, in some respects, as to its underlining cause, it was agreed that the immediate cause

was a psychological and an emotional reaction of the child to the home environment. Secondly, the evidence establishes clearly that almost immediately after the child was taken from the home accelerated growth occurred. With the exception of Doctor Rossi, who attributed this to a change of nourishment rather than a change of environment, the experts were in accord. Each expert made it clear this catch-up should be anticipated. While considerable testimony was offered in support of the proposition that a child is, under proper conditions, better off in its natural home, it appears to me from the record that the action of the Juvenile Court in removing the child at the time it did was clearly proper. As indicated above, the issue is whether the child should be returned, after proper preparation, or parental rights should be terminated. Even this area of dispute is rather narrow, for it was agreed among all the experts that unless substantial changes were made in the home environment the child should not be returned.

As pointed out above, termination of parental rights should not occur unless there was clear and convincing evidence to establish the necessity of such action, in accordance with the law. The State, of course, has the burden of proof that such necessity exists. While the statute does not spell out the exact role of the appellate court (MSA 27.3178 (45.1)), it appears to me that my function is to determine whether

there was such clear and convincing evidence. I am satisfied that there was and that the decision of the Probate Judge should be affirmed."

B. Michigan Court of Appeals and Michigan Supreme Court

Petitioners filed applications for leave to appeal both before the Michigan Court of Appeals and the Michigan Supreme Court, and both applications were denied.

C. United States District Court for Western District of Michigan, Southern Division

Petitioners filed a shot-gun complaint before the Federal District Court in Grand Rapids, Michigan. Thereafter, Judge Gibson issued a Decision on September 3, 1981, dismissing the Complaint in its entirety.

D. United States Court of Appeals for the Sixth Circuit

Petitioners filed an appeal from the decision of Judge Gibson to the United States Court of Appeals for the Sixth Circuit, and on March 23, 1982, Senior Circuit Judge Phillips issued an Opinion affirming the decision of Judge Gibson.

CONCLUSION

For the reasons set forth herein, Thomas D. Geil, guardian ad litem of Donald Wayne Castorr, subject of these proceedings, respectfully requests that the Writ of Certiorari be denied.

Respectfully submitted,

McCROSKEY, FELDMAN, COCHRANE and BROCK, P.C.

By _____
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Dated: August 3, 1982